stances whereby he *becomes* entrusted, or whereby his receipt *becomes* a receipt for or on account of another and he fraudulently converts it he commits an offence under Section 1 of the Larceny Act 1901."

In *Ratanlal*—Law of Crimes 14th Edition p. 981, it is stated that "The property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or the beneficial interest in or ownership of it must be in some other person, and the offender must hold such property on trust for such other person or in some way for his benefit." (*Hok Cheng & Co.* v. *Tha Ka Do* (1913) 7 L.B.R. 16 a case unobtainable here).

In *Rex* v. *Kavena Ismail Sahib*, (1937) S.S. L.R. 260; 6 M.L.J. 242, it was held that a mortgagor of, and in possession of, a tongkang could not be convicted of criminal breach of trust of the tongkang. "In the opinion of the Court 'property' for the purpose of Section 405 of the Penal Code must be something tangible and a mere incorporeal right does not fall within the purview of the section."

The question therefore in this case is whether there is any "property": tangible property of the respondent "entrusted" to the appellant. Clearly the respondent never entrusted the appellant with the land. The latter was never in charge of it and has taken no produce from the land. The case of *Durge Tewari* v. *Emperor*, 36 Calcutta 758, quoted in argument has no application here. In that case the appellants being set to guard land and to inform the proprietor when the crop was ready to be reaped, cut the crop themselves and converted it; and it was held that they had been entrusted with the crop. But here the land and the growing crop is never entrusted to the appellant.

It appears to me that the respondent can acquire no "property" in respect of which criminal breach of trust can be committed in the coupon, until he acquires the coupon. A mere contractual right to have the coupon delivered to him is not sufficiently tangible to be the subject of a criminal breach of trust, even if the contract can be legally enforced, though in my opinion the Court will not enforce the contract for, apart from criminality, it is made for the express purpose of defeating the Ordinance (Cap. 125). Persons who contract trust the other party to the contract to perform the contract. In that sense the respondent trusted the appellant. But he did not entrust any of his property to the appellant. The respondent cannot use the land unless the appellant allows him, he cannot make use of the coupon until the appellant obtains it and delivers it to him. Such rights as he may have, very doubtful ones in this case, all depend upon the appellant performing his part of their bargain. There is no receipt of the coupon for and on account of the respondent for the respondent is compelled to treat the appellant as a principal and allow him to receive the coupon in his capacity as customary landholder, otherwise the respondent has no hope at all of obtaining it. At the most there is a breach of contract but no breach of trust under Section 405.

The learned District Judge came to the conclusion that the appellant "had committed a dishonest breach of trust reposed in him." In so doing he takes a far wider view of the section than the words can bear. There must be an entrustment of tangible property of a person other than the accused and a dishonest conversion of such property in order to warrant a conviction. In this case it is impossible to say that there is any property or beneficial interest in the subject matter of the charge in any person other than the accused. The appeal is allowed and the conviction quashed.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

June 23, 1938.

REX v. LIEW HOW YEONG & ORS.

[SINGAPORE MAGISTRATE'S APPEAL No. 34 of 1938]

Chandu Revenue Ordinance, (Cap. 223), s. 11, sub-s. 3 (d)—Possession of non-Government Chandu.

Five persons were accused of being in possession of certain non-Government chandu found in an otherwise unused room at No. 30 Jervois Road, Singapore. The ostensible tenant of No. 30 Jervois Road was No. 4 accused, but he was not otherwise in occupation of the room where the chandu was found. He and Nos. 1, 3 and 5 accused each occupied separate quarters at that address and No. 2 accused was a servant and resided in the servant's quarters. The chandu belonged to and originated from a business known as "Great Southern Trading Co." proved to be carried on in Singapore by No. 1 accused as a cloak for the importation of non-Government chandu. The 1st accused was convicted. The 2nd accused, as a mere servant at the said private residence, was acquitted and Nos. 3, 4 and 5 accused were convicted.

Held, that in order to establish joint possession in the first, third, fourth and fifth accused it was necessary to establish that all were concerned in the business of "Great Southern Trading Co." Unless Nos. 3, 4 and 5 were known to be jointly engaged in the illegal venture with No. 1 it could not be said that they were in possession of the particular parcel of chandu found at the house they lived in. No adverse inference ought to be drawn against Nos. 3, 4 and 5 because No. 1 gave evidence which while seeking to exculpate Nos. 3, 4 and 5 did not add anything to the prosecution's evidence. When several accused are charged with jointly having possession of

non-Government chandu they must all be shown to have a possessive interest though not necessarily an equal possessive interest.

MAGISTRATE'S APPEAL.

D. K. Walters for appellants Nos. 1 and 3.

E. R. Koek for appellant No. 2.

Howe, Crown Counsel for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

HORNE, J.—The three appellants, afterwards referred to as No. 3, No. 4 and No. 5 accused, were charged jointly with two other persons that they on the 14th January, 1938, at 2-30 a.m. in No. 70 Jervois Road did have in their possession custody and control 3166 tahils of non-Government chandu contrary to section 11 (3) (d) of Chapter 223.

Four persons including the appellants were convicted and one acquitted.

The form of the charge is open to question but the case was conducted throughout on the basis of joint possession.

The grounds of appeal are that there was not any or any sufficient evidence of possession, that the learned District Judge was wrong in holding that knowledge of the chandu was sufficient to constitute possession, that No. 5's unexplained possession of $1,285 was any evidence of or corroborative of the charge, that the evidence relating to other chandu at 118 Lavender Street ought not to have been taken into consideration against No. 3, No. 4 and No. 5.

It appears to be beyond doubt that a business carried on under the name of the South China Trading Co. at 30, The Arcade was being used as a cloak for the importation of chandu. This concern had been carried on for some months prior to the 13th January and had a store at Lavender Street.

On the 13th January a quantity of illicit chandu was seized about 10-30 p.m. at Tanjong Pagar Road. About midnight a house, 70 Jervois Road, where all 5 accused were living was raided and illicit chandu was found there. On the following day keys were found below the Charge-room window, where the accused were then held, which on the following day were found to fit padlocks of the outer and inner doors at 118 Lavender Street. On opening this place drums of caustic soda, amongst other goods, were found, also some empty drums and a heap of sodium carbonate. Two drums, standing apart from the others on being opened, were found to contain sodium carbonate, and on this sodium carbonate, being broken up containers similar to those found in Jervois Road were revealed and found to contain Red Lion Chandu in similar one-tahil tins to the one-tahil tins found at Jervois Road and at Tanjong Pagar Road the previous night. In all 1669 tahils were found at Lavender Street as well as the two containers, 15 empty containers were also found. On analysis the chandu found in each place proved to be Red Lion chandu.

In order to establish a joint possession in No. 1, No. 3, No. 4 and No. 5 it seems to be necessary to establish that all were concerned in this business called the South China Trading Co. which was clearly importing Red Lion Chandu concealed in packages alleged to be caustic soda. This concern between 13th October and 23rd December, 1937, had transmitted $174,000 to Hong Kong. According to the salesman employed at 30 The Arcade, he had nothing to do with the caustic soda, but he had sold other goods during six or seven months valued $1,000. So far as the documents seized at the Arcade office show the business had imported 105 drums of alleged caustic soda, which according to the insurance policy seized were valued at $75 per drum, while the Import Declaration gave a value of $30 per drum. One of the shipping documents relating to 10 drums caustic soda dated 21st July is chopped "South China Trading Co. Manager" and the signature "C. Chu" in writing follows. "Chu" is presumably No. 4 accused. Another dated 9th July is chopped "Great Southern Trading Co." with the signature "C. Chu" in writing. It relates only to paint and preserved fruits. According to the rent receipts the South China Trading Co. occupied 30 The Arcade from the 7th July, 1937.

Chiu Chiang is also the ostensible tenant of 70 Jervois Road, the receipt for the rent is given in his name and was found at 30 the Arcade. Document "AA" a lease is also signed for South China Trading Co. C. Chu "Manager," while Municipal bills and rent receipts relating to 118 Lavender Street are also found at the Arcade Office. The motor car receipts are also in Chu's name and Chu operates the firm's banking account. There was no evidence beyond that of the clerk of any sale or re-export of the goods imported. Eighty of the 105 drums of caustic soda imported according to the shipping documents were found at 118 Lavender Street.

According to the salesman, Loh Wing Tuk, No. 1 accused was the proprietor of the business. This witness would not necessarily know what the internal arrangements were but clearly he regarded it as No. 1's business and he took it that No. 4 and No. 3 were employed there. But

this witness was seldom in the office and he is speaking of a period of six months. He had been to Jervois Road and seen all the accused except No. 2 there and had been with No. 1 to 118 Lavender Street but not to the inner room and had helped him to land goods. The tamby a boy of 12 years stated that he was paid his salary by No. 1 who was there daily. The others only came irregularly. Then the motor driver Da Suki bin Haji looked upon No. 1 as his employer; it was No. 1 who paid him his salary. He was not questioned as to his bringing No. 5 accused alone to the house on the night of the 13th. Perhaps there was good reason not to do so. But he gave evidence implicating No. 1 in the Tanjong Pagar Road chandu.

To summarise the prosecution case, it appears that the prosecution shewed that No. 1 was the proprietor of the business and that business was engaged in smuggling opium; that No. 4 was in his employ and under his control and also was the ostensible tenant of Jervois Road and Arcade premises and would by his association with the office know that the firm had 118 Lavender Street; that all of them lived in the one house Jervois Road, that No. 3 and No. 5 irregularly attended at 30 The Arcade, and that No. 5 returned in the motor car on the night of the seizure with $1,300 on him, but that only No. 1 accused was shewn to have been actively engaged at No. 118 Lavender Street and he must have had or had access to the keys of this place whenever he required them; that those keys are found outside the Charge-room on the afternoon of the 14th January. No. 2 was shewn to be a servant at Jervois Road and certain letters of which nothing much can be made against him were under his pillow in an outhouse where no chandu was found.

It was upon this evidence that the learned District Judge came to the conclusion that there was a case against all the accused. Had he given full consideration at that stage as to whether the prosecution had made out a case which if unrebutted would warrant the conviction of all of them on the charge of possession, he might quite easily have acquitted some of them. And it is difficult to understand how he could call on No. 2 after No. 1 had given evidence and then acquit him. But, by so doing, the learned District Judge evidently considered that at that stage a joint possession had been established against all, and it was only by accepting No. 1's evidence that No. 2 was his servant that the learned District Judge was able to acquit No. 2. But apparently he would not accept the same evidence with regard to No. 3, No. 4 and No. 5 because they had been to the office at 30 Arcade. There was clearly possession established in the case of No. 1, but unless the others can be shewn to be jointly engaged in the illegal venture with No. 1, who after all, is put forward by the prosecution as the owner of the business, in this importation and distribution of illicit chandu, it cannot be said that they are in possession of this particular parcel found at the house they live in.

Apparently the learned District Judge arrives at the opinion they all had possession except No. 2 by first of all drawing the inference that they all knew what the South China Trading Co. was doing. But the evidence of the prosecution is not the same against each and with all respect to the learned District Judge's experience of this class of case no adverse inference ought necessarily to be drawn against Nos. 3, 4 and 5 because No. 1 gives evidence which while seeking to exculpate them does not add anything to the prosecution's evidence.

This is not a case where No. 1 is charged with importing (as he well could have been) and the others charged with aiding, being interested, or concerned in the importation. The charge is jointly having possession. They must all be shewn to have a possessive interest though not necessarily an equal possessive interest.

Possession is defined in *Byrne's* Law Dictionary p. 680 as follows:—

> "In its primary sense, possession is the visible possibility of exercising physical control over a thing, coupled with the intention of doing so.....First, there must be actual or potential physical control. Secondly, physical control is not possession unless accompanied by intention.....Thirdly, the possibility and intention must be visible or evidenced by external signs....."

The inference first of all of knowledge as to what was going on is not in my opinion a safe one to draw against No. 3 from residence at Jervois Road, no employment, and irregular visits to the office; and it is not to be assumed that he necessarily has the knowledge because No. 1 says he has not. It can only be inferred, if at all from the prosecution evidence. And although there can be no possession without knowledge, it becomes very difficult to presume possession from an inference of knowledge of the existence of the thing if the possibility of exercising physical control and the intention to exercise it are to be evidenced by external signs. The only difference between the evidence against No. 3 and that against No. 5 is the latter's possession of $1,300 and the absence of explanation of such possession. The case against No. 5 is made no stronger by No. 1's evidence, and therefore rests upon association with No. 1, an association not shewn beyond reasonable doubt to be a criminal association.

With regard to No. 4, however, there is a much closer association with No. 1. The documentary evidence shows him to take a very active part in the business of No. 1. But does it show an actual knowledge of what was going on. The fact that the chandu is found in the house wherein he resides, of which he is the ostensible tenant tends to show a potential physical control over that illicit chandu, but that he knew it was there is a matter of inference, and though there is ample evidence of knowledge of importation of goods, is it possible from his knowledge of the money transmitted to China to draw the inference that he knew all about what was hidden in the imported goods. In my opinion, having regard to the fundamental rule that the prosecution must prove the case beyond reasonable doubt, I find it unsafe to come to such a conclusion. This has been a hit or miss sort of prosecution and no doubt the conduct of the appellants gives rise to the suspicion that the appellants were concerned in the importation, but that is not proof.

With regard to No. 4 accused it has however been suggested that even if the conviction for possession under section 11 is quashed, this Court may substitute a verdict of being concerned in the importation under section 12. While section 310 of the Criminal Procedure Code empowers this Court to alter a finding, I think that combined effect of sections 176 and 177 of the Criminal Procedure Code do not allow me to alter the finding in the present case. But even if they did, it is quite clear that the appellant (No. 1 accused) ought to have an opportunity of pleading to such a charge, for the facts which could support it may be vastly different from those which would support a charge of possession under section 11 and moreover he might quite well have an answer to it. I am not however to be taken as deciding that the prosecution cannot bring a charge under section 12 against No. 4 accused.

The appeals are allowed and the convictions quashed.

Appeal allowed.

Solicitors for Appellants Nos. 1 & 3—
Allen & Gledhill.

Solicitors for Appellants No. 2—
Chan & Eber.

[APPELLATE CRIMINAL JURISDICTION]

HOWES, J.

September 12, 1938.

REX v. TAN HOAY.

[PENANG MAGISTRATE'S APPEAL No. 28 of 1938]

Chandu Revenue Ordinance, S. 11 (3) (d) —Proof of mens rea unnecessary.

Section 11 (3) (d) of the Chandu Revenue Ordinance imposes an absolute prohibition by law of the possession custody or control of non-Government chandu. The usual presumption that *mens rea* is an essential ingredient of every offence is displaced by the express wording of the section. Excepting in cases such as this, in order to constitute an offence there must in general be guilty knowledge on the part of the accused person or his agent.

MAGISTRATE'S APPEAL.

B. E. Ross, for the Appellant.

T. D. Hughes, Crown Counsel, for the Crown.

Cur. Ad. Vult.

HOWES, J.—In this case the Appellant was convicted under Section 11 (3) (d) of Chapter 223 (Chandu Revenue Ordinance) of having in her possession chandu other than Government chandu. The subsection reads: "No person shall, except as permitted by this Ordinance or by any rules made thereunder—

> (d) have in his possession, custody or control any chandu other than Government chandu."

It will be noted that in this subsection there is no question of "knowingly," or any other qualifying attribute to the having in possession, custody or control. It is an absolute prohibition by the legislature, such as occurs in several statutes of this nature, where revenue or excise is concerned.

This point was considered by Mr. Justice Wright in the case of *Sherras* v. *De Rutzen* (1895, 1 Q.B. at page 921) where he said. "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

As I have already said, the Section is prohibitive: "No person shall have in his possession, custody or control." If qualifying words such as "knowingly" or "intentionally" were included, then the prosecution would have to prove knowledge or intention on the part of the accused.